IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 325 OF 2005

Smt.Sumatibai Vishnupant Parange.... Appellant.
Versus
Smt.Shailaja Mahadeo Wadke (since decd.)
through L.Rs.
Mahadeo Baburao Vadke & Ors. ..... Respondents.

-: ALONG WITH :-

SECOND APPEAL NO. 347 OF 2005

Smt.Sumatibai Vishnupant Parange.... Appellant.
Versus
Smt.Shailaja Mahadeo Wadke (since decd.)
through L.Rs.
Dilip Mahadeo Wadke & Ors. ..... Respondents.

Mr. Atul P. Vanarse for the Appellant.
Mr. S. N. Chandrachood for Respondent Nos.1b to 1g.

CORAM : A. S. OKA, J.

DATED : 21ST APRIL, 2005.

P.C.:

After these second appeals were fully argued before me, time was granted to the parties to make an efforts for amicable settlement of the dispute. However, the Advocates appearing for the parties have stated today that inspite of best efforts made by them, the parties are not in a position to settle the dispute amicably.

2. The second appeal No. 325 of 2005 arises out of a suit for partition being New Regular Civil Suit No. 4258 of 2000 filed by Respondent Nos.1 and 2. The case of the Respondent Nos.1 and 2 is that one Ganpat Borlikar was the owner of the suit property. The Appellant is the original Defendant No.1. The case of the original Plaintiff is that the original Defendant Nos.1 to 10, who are the legal representatives of deceased Ganpat are having 1/10th share each in the suit property. By registered Sale Deed dated 9th August, 1984 the original Plaintiff purchased 9/10th share in the suit property of the original Defendant Nos.2 to 10. On the basis of the said Sale Deed, suit for partition and separate possession was filed by original Plaintiffs.

3. The case of the Appellant is that before institution of the suit for partition she filed a substantive suit against the original Plaintiffs in the suit for partition and other defendants for asserting that she has a preferential right to purchase 9/10th shares in the suit property of the other co-owners. The defence of the Appellant to the suit for partition filed by the original Plaintiffs

was that the sale deed executed by the original defendant Nos.2 to 10 in favour of the Plaintiffs is illegal, void and not binding on her. The trial Court held that original Defendant Nos.1 to 10 in the suit for partition have 1/10th share each in the suit property. However, the trial Court rejected the case of the original Plaintiffs that they have purchased the 9/10th share of the Defendant Nos.2 to 10. An appeal was preferred by the original Plaintiffs and the said appeal has been allowed by the District Court and there is a preliminary decree of partition passed in favour of the original Plaintiffs in respect of 9/10th share in the suit property.

4. Second Appeal No.347 of 2005 arises out of a suit being Regular Civil Suit No. 1868 of 1988 filed by the Appellant for the purpose of challenging the sale transaction on the ground that the same is voidable as the Appellant has not been permitted to exercise the right under Section 22 of the Hindu Succession Act, 1956. The trial Court decreed the suit upholding the right of pre-emption. The Appellate Court has reversed the said decree on the ground that the suit filed by the Appellant was barred by limitation.

5. Considering the controversy involved in both the Appeals, it is necessary to first deal with the controversy in Second Appeal No.347 of 2005. It is obvious that unless the Appellant succeeds in her suit for asserting right of pre-emption, the decree for partition passed in favour of the purchaser cannot be disturbed.

6. Learned Counsel appearing for the Appellant submitted that in the plaint in Regular Civil Suit No. 1868 of 1988 as originally filed on 13th September, 1988, there was a foundation already made for claiming right of pre-emption. He submitted that by amending the plaint, paragraph 4A was inserted and suitable prayers were incorporated for specifically claiming relief on the basis of right of pre-emption. He, therefore, submitted that though the plaint was amended in the year 1998 the amendment would relate back to the date of institution of the suit. He, therefore, submitted that the suit filed by the Appellant was within limitation. He submitted that the Appellate Court committed error by setting aside the decree passed by the trial Court. He relied upon the correspondence made prior to the institution of the suit by the Appellant in which right of

pre-emption was asserted. He placed specific reliance on document at Exhibit 99 which is reply by the Appellant to the notice issued by the purchasers in which the Appellant asserted that since she had a share, the other co-sharers ought to have offered their share to her for sale. He submitted that Article 97 of the Limitation Act, 1963 cannot have application. Shri Chandrachood, learned Counsel appearing for the Respondents, has supported the impugned judgments and decrees.

7. On a plain reading of Article 97 of the Limitation Act of 1963, it is crystal clear that a suit to enforce a right of pre-emption whether the right is founded on law or general usage or on special contract will be governed by Article 97. The starting point of limitation under article 97 is when the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold. Where the subject-matter of the sale does not admit of physical possession of the whole or part of the property, the starting point of limitation is the date on which the instrument of sale is registered. In the present case, the purchaser has acquired undivided share and therefore they could not have possessed the

said share. The sale deed is admittedly registered on 9th August, 1984. Therefore, the said date will have to be taken as starting point of limitation and it is obvious that suit is not filed within the stipulated period of one year from the date on which the cause of action arose for the purpose of filing suit. The suit was filed on 13th September, 1988. That is the reason why the Appellate Court has dismissed the suit filed by the Appellant. The Appellate Court has recorded a finding that the suit was barred by limitation. In this view of the matter no fault can be found in the judgment of the Appellate Court by which suit filed by the Appellant for establishing right of preferential purchase has been dismissed.

8. There is a registered sale deed in respect of 9/10th undivided share in favour of the purchasers who are the Plaintiffs in suit for partition. On the basis of the registered sale deed by which they have acquired 9/10th undivided share in the suit property, they are entitled to file a suit for partition and accordingly a preliminary decree of partition has been passed. There is no error in the said decree.

9. In view of the aforesaid discussion, the Second

Appeals are dismissed. No order as to costs.

10. Parties to act on the authenticated copy of this order.

Sd/-

(A. S. OKA, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 562 OF 2005

IN

SECOND APPEAL NO. 325 OF 2004

Smt.Sumatibai Vishnupant Prange.... Appellant.
Versus
Smt.Shailaja Mahadeo Wadke (since decd.)
through L.Rs.
Mahadeo Baburao Vadke & Ors. ..... Respondents.

-: ALONG WITH :-

CIVIL APPLICATION NO. 583 OF 2005
IN
SECOND APPEAL NO. 347 OF 2005

Smt.Sumatibai Vishnupant Prange.... Appellant.
Versus
Smt.Shailaja Mahadeo Wadke (since decd.)
through L.Rs.
Dilip Mahadeo Wadke & Ors. ..... Respondents.

Mr. Atul P. Vanarse for the Appellant.

Mr. S. N. Chandrachood for Respondent Nos.1b to 1g.

CORAM : A. S. OKA, J.

DATED : 21ST APRIL, 2005.

P.C.:

1. In view of the dismissal of the Second Appeals, these civil applications do not survive. Hence rejected.

Sd/-

(A. S. OKA, J.)